IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

THURSDAY, THE 30TH NOVEMBER 2006 / 9TH AGRAHAYANA 1928

WP(C).No. 31836 of 2006(M)

AGAINST THE ORDER IN IA.4002/2006 IN
OS.409/2004 of PRL.M.C.,NEYYATTINKARA
A. S.97/2006 OF SUB COURT, NEYYATTINKARA

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PETITIONER:

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1. S.R.VIJAYAN, VALIYAVILA VEEDU,
KOTTUKAL VILLAGE, NEYYATTINKARA, RESIDING AT
'SREERANGAM', TC.55/2060, NETHAJI ROAD LANE,
MANIYANKARATHOPPU, PAPPANAMCODE P.O.,
THIRUVANANTHAPURAM-695020.

2. R.VIJAYAMMA, RESIDING AT -DO- -DO-.

BY ADV. SRI.S.JAMES VINCENT

RESPONDENTS:

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1. THE STATE OF KERALA,
REPRESENTED BY THE SECRETARY TO GOVERNMENT,
REVENUE DEPARTMENT, SECRETARIAT,
TRIVANDRUM-695001.

2. THE SPECIAL TAHSILDAR (LA),
OFFICE OF THE NAIONAL HIGH WAY,
KESAVADASAPURAM, TRIVANDRUM-695004.

3. THE TAHSILDAR,
NEYYATTINKARA.

4. THE VILLAGE OFFICER,
KOTTUKAL VILLAGE, KOTTUKAL P.O.,
NEYYATTINKARA TALUK.

5. SAROJINI AMMA, SAROJA BHAVAN,
KOTTUKAL P.O., NAYYATTINKARA TALUK.

6. ANILKUMAR,
VRINDAVAN, -DO- -DO-.

BY //

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON 30/11/2006, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

M.SASIDHARAN NAMBIAR,J.

W.P.(C) .NO.31836 OF 2006

Dated 30th November 2006

JUDGMENT

Can the court which passed the decree grant an order of stay of execution of that decree, after an appeal was presented with an application to condone the delay is the interesting question to be decided.

2. Petitioners are defendants in O.S.409/2004 on the file of Munsiff court, Neyyattinkara. Suit was decreed ex-parte. Petitioners filed A.S.97/2006 along with Ext.P6 application under Section 5 of Limitation Act to condone the delay of 270 days. They filed I.A.4002/2006 before trial court under Order XLI Rule 5(2) of Code of Civil Procedure to stay execution of decree till they could get a stay order from Appellate court for condoning delay. Under Ext.P8 order application was dismissed holding that once the appeal is filed court which passed the decree cannot grant the order of stay. This petition is filed under Article 227 of Constitution of India to quash Ext.P8 order and to grant an order of stay of execution till

petitioners could get order of stay from Appellate court.

3. Arguments of learned counsel appearing for petitioners is that delay in filing the appeal was not due to any negligence or latches on the part of petitioners but by their counsel against whom they have filed Ext.P3 complaint before Munsiff, Neyyattinkara and it is only thereafter petitioners could get certified copy of the decree and prefer the appeal and in such circumstance petitioners could not get an order from the appellate court, as an order of stay could be passed only after condoning the delay in filing appeal and therefore trial court should have granted an order of stay as sought for. Learned counsel argued that for no fault of petitioners, they shall not be directed to suffer the consequences for no fault on their part and in such circumstance this court has to exercise the extra ordinary jurisdiction and grant the relief.

3. Even though learned counsel appearing for petitioners vehemently argued that till the appeal is entertained by appellate court after condoning the delay, trial court is competent to grant an order of stay of execution as provided under Order XLI of Rule

5(2) of the Code, I cannot agree with the argument. Sub Rule 2 empower the court which passed the decree and sub rule 1 empower the appellate court, to grant order of stay of execution. When there is specific provision under Rule 5 to grant order of stay Section 151 of the Code of Civil Procedure cannot be invoked to grant the relief. The inherent power can be exercised in the absence of specific provision in the Code. When there is restrictions to the power to grant order of stay of execution it cannot be widened by invoking the inherent power under Section 151 of the Code. Sub Rule 2 of Rule 5 specifically provides that where an application is made for stay the court which passed the decree. It reads;

> "Where an application is made for stay of execution of an appelable decree before the expiration of the time allowed for appealing therefrom, the Court which passed the decree may on sufficient cause being shown order the execution to be stayed."

Sub rule 3 mandates that no order for stay either

under sub rile 1 or sub rule 2 shall be granted unless clauses (a), (b) and (c) are satisfied. Sub rule 1 of Rule 5 provides that an appeal shall not operate as a stay of proceedings under a decree or order appealed from nor execution of a decree shall be stayed by reason of filing of an appeal and order of stay can be granted only for sufficient reasons. As provided under sub rule 3, before granting an order of either the court which passed the decree or the appellate court shall be satisfied that substantial loss may result to the party applying for stay of execution unless the order is granted and the application has been made without unreasonable delay and security has been given by the applicant for due performance of such decree or order. Sub rule 3 of Rule 3A of order XLI mandates that appellate court shall not make an order for stay before condoning the delay and admitting the appeal after hearing under rule 11. The provisions make absolutely clear that the court which passed the decree could grant an order of stay only when the application is made "before the expiration of the time allowed for appealing therefrom" and not after the expiry of the

period for filing an appeal against the decree. The limited power provided under sub rule 2 of Rule 5 cannot be exercised to grant an order of stay when the period for preferring the appeal expired and an appeal was filed with an application to condone the delay as provided under Rule 3A of Order XLI. The dismissal of the application by the trial court is perfectly legal and proper.

4. Arguments of learned counsel appearing for petitioners is that because of the negligence or collusion of their counsel, petitioners could not file the appeal in time and as the appeal could not be filed in time, they could not get an order of stay of execution as mandated under sub rule 3 of Rule 3A and if the decree is to be executed before the delay is condone, petitioners would be put to substantial loss and therefore this court may grant an order of stay of execution. Sub Court, Neyyattinkara is directed to dispose Ext.P6 application to condone the delay, as expeditiously as possible and in any event within 30 days from the date of receipt of copy of this judgment. To enable petitioners to get an order from Sub court, Neyyattinkara, executing court is directed to keep the execution petition in abeyance

for three weeks.

Writ petition is disposed of accordingly.

M.SASIDHARAN NAMBIAR,
JUDGE.

uj.